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# The UNIDROIT Draft Convention on the International Protection of Cultural Property

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In September/October 1993 the third and last session of government representatives and delegates of international organisations met in Rome and prepared a new version of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Property.<sup>1</sup> This version will be submitted to a diplomatic conference in 1994 which may formulate a final draft to be opened for signature of the participating States.

Apart from substantial formal improvements the new draft Convention differs from the preliminary draft<sup>2</sup> in several respects. Five issues should be summarized briefly.

## 1 Definition of Cultural Objects

Art. 2 gives more flesh and bones to the notion of cultural objects. It refers to Art. 1 of the UNESCO Convention of 14 November 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.<sup>3</sup> This Art. 1 mentions eleven different categories of cultural property and reads as follows:

“For the purposes of this Convention, the term ‘cultural property’ means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
- (c) products of archaeological excavation (including regular and clandestine) or of archaeological discoveries;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;

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- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest, such as:
  - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
  - (ii) original works of statuary art and sculpture in any material;
  - (iii) original engravings, prints and lithographs;
  - (iv) original artistic assemblages and montages in any material;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
- (i) postage, revenue and similar stamps, singly or in collections;
- (j) archives, including sound, photographic and cinematographic archives;
- (k) articles of furniture more than one hundred years old and old musical instruments.”

## 2 Qualification of Excavated Objects

According to Art. 3(2) all objects unlawfully excavated or lawfully excavated but unlawfully retained shall be deemed to have been stolen. Thereby archaeological objects enjoy more effective protection by chapter II of the Draft and doubts as to the qualification of unlawfully excavated objects<sup>4</sup> are removed.

## 3 Time Limits for Claims for Restitution or Return

Still open is the problem within which time limits a claim for restitution of stolen objects or a request for return of illegally exported objects have to be brought. Art. 3(3) and Art. 5(4) give the same alternatives for a relative time limit (one or three years) and an absolute time barrier (thirty or fifty years). There are, however, good reasons for differing time limits, longer periods in case of theft and shorter one in case of illegal exports. Art. 3(4) draws this conclusion for stolen objects belonging to a public collection and proposes either an exemption from any prescription or an absolute time limit of 75 years.

## 4 Conflicting Interests of States as to the National Importance of Cultural Objects

The requesting State and the requested State may have conflicting interests with regard to the same illegally exported cultural object.

The new draft reduces the grounds for refusing the return of illegally exported cultural objects. According to Art. 6 only a closer connection with the culture of the State addressed (not of a third State) and previous unlawful removal from the State addressed may justify a refusal to return the objects in question.

## 5 Compensation of *Bona Fide* Possessor

Art. 4(1) and Art. 8(1) treat the bona fide possessor of a stolen and of an illegally exported cultural object alike and in both cases seem to impose the burden of proof as to the *bona fides* on the purchaser.

## Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects

### Chapter I – Scope of Application and Definition

#### Article 1

This Convention applies to claims of an international character for

- (a) the restitution of stolen cultural objects removed from the territory of a Contracting State;
- (b) the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects because of their cultural significance.

#### Article 2

For the purposes of this Convention, cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science such as those objects belonging to the categories listed in Article 1 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

### Chapter II – Restitution of Stolen Cultural Objects

#### Article 3

(1) The possessor of a cultural object which has been stolen shall return it.

(2) For the purposes of this Convention, an object which has been unlawfully excavated or lawfully excavated and unlawfully retained shall be deemed to have been stolen.

(3) Any claim for restitution shall be brought within a period of [one] [three] year[s] from the time when the claimant knew or ought

reasonably to have known the location of the object and the identity of its possessor, and in any case within a period of [thirty] [fifty] years from the time of the theft.

(4) However, a claim for restitution of an object belonging to a public collection of a Contracting State [shall not be subject to prescription] [shall be brought within a time limit of [75] years].

[For the purposes of this paragraph, a “public collection” consists of a collection of inventoried cultural objects, which is accessible to the public on a [substantial and] regular basis, and is the property of

- (i) a Contracting State [or local or regional authority],
- (ii) an institution substantially financed by a Contracting State [or local or regional authority],
- (iii) a non profit institution which is recognised by a Contracting State [or local or regional authority] (for example by way of tax exemption) as being of [national] [public] [particular] importance, or
- (iv) a religious institution.

#### Article 4

(1) The possessor of a stolen cultural object who is required to return it shall be entitled at the time of restitution to payment by the claimant of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.

(2) In determining whether the possessor exercised due diligence, regard shall be had to the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained.

(3) The possessor shall not be in a more favourable position than the person from whom it acquired the object by inheritance or otherwise gratuitously.

### Chapter III – Return of Illegally Exported Cultural Objects

#### Article 5

(1) A Contracting State may request the court or other competent authority of another Contracting State acting under Article 9 to order the return of a cultural object which has

(a) been removed from the territory of the requesting State contrary to its law regulating the export of cultural objects because of their cultural significance;

(b) been temporarily exported from the territory of the requesting State under a permit, for purposes such as exhibition, research or restoration, and not returned in accordance with the terms of that permit [, or

(c) been taken from a site contrary to the laws of the requesting State applicable to the excavation of cultural objects and removed from that State].

(2) The court or other competent authority of the State addressed shall order the return of the object if the requesting State establishes that the removal of the object from its territory significantly impairs one or more of the following interests

(a) the physical preservation of the object or of its context,

(b) the integrity of a complex object,

(c) the preservation of information of, for example, a scientific or historical character,

(d) the use of the object by a living culture,

or establishes that the object is of outstanding cultural importance for the requesting State.

(3) Any request made under paragraph 1 shall contain or be accompanied by such information of a factual or legal nature as may assist the court or other competent authority of the State addressed in determining whether the requirements of paragraphs 1 and 2 have been met.

(4) Any request for return shall be brought within a period of [one] [three] year[s] from the time when the requesting State knew or ought reasonably to have known the location of the object and the identity of its possessor, and in any case within a period of [thirty] [fifty] years from the date of the export.

## Article 6

(1) When the requirements of Article 5, paragraph 2 have been satisfied, the court or other competent authority of the State addressed may only refuse to order the return of a cultural object where

(a) the object has a closer connection with the culture of the State addressed [, or

(b) the object, prior to its unlawful removal from the territory of the requesting State, was unlawfully removed from the State addressed].

(2) The provisions of sub-paragraph (a) of the preceding paragraph shall not apply in the case of objects referred to in Article 5, paragraph 1(b).

## Article 7

(1) The provisions of Article 5, paragraph 1 shall not apply where the export of the cultural object is no longer illegal at the time at which the return is requested.

(2) Neither shall they apply where

(a) the object was exported during the lifetime of the person who created it [or within a period of [five] years following the death of that person]; or

(b) the creator is not known, if the object was less than [twenty] years old at the time of export [; except where the object was made by a member of an indigenous community for use by that community].

## Article 8

(1) The possessor of a cultural object removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects because of their cultural significance shall be entitled, at the time of the return of the object, to payment by the requesting State of fair and reasonable compensation, provided that the possessor neither knew nor ought reasonably to have known at the time of acquisition that the object had been unlawfully removed.

[(2) Where a Contracting State has instituted a system of export certificates, the absence of an export certificate for an object for which it is required shall put the purchaser on notice that the object has been illegally exported.]

(3) Instead of requiring compensation, and in agreement with the requesting State, the possessor may, when returning the object to that State, decide

(a) to retain ownership of the object; or

(b) to transfer ownership against payment or gratuitously to a person of its choice residing in the requesting State and who provides the necessary guarantees.

(4) The cost of returning the object in accordance with this article shall be borne by the requesting State, without prejudice to the right of that State to recover costs from any other person.

(5) The possessor shall not be in a more favourable position than the person from whom it acquired the object by inheritance or otherwise gratuitously.

## Chapter IV – Claims and Actions

### Article 9

(1) Without prejudice to the rules concerning jurisdiction in force in Contracting States, the claimant may in all cases bring a claim or request under this Convention before the courts or other competent authorities of the Contracting State where the cultural object is located.

(2) The parties may also agree to submit the dispute to another jurisdiction or to arbitration.

(3) Resort may be had to the provisional, including protective, measures available under the law of the Contracting State where the

object is located even when the claim for restitution or request for return of the object is brought before the courts or other competent authorities of another Contracting State.

## Chapter V – Final Provisions

### Article 10

Nothing in this Convention shall prevent a Contracting State from applying any rules more favourable to the restitution or the return of a stolen or illegally exported cultural object than provided for by this Convention.

### Notes

- 1 Cp. the text of this version *infra* p. 303.
- 2 The version of 26 January 1990 is reproduced in (1992) 1 *International Journal of Cultural Property* 252–255.
- 3 823 U. N. T S. 231 (no 11806).
- 4 Cp. especially the criticism of the American case *United States v McClain*, 593 F. 2d 658 (5th Cir 1979) in note, *Art Theft: National Stolen Property Act Applied to Nationalised Mexican Pre-Columbian Artifacts*, (1978) 10 *New York University Journal of International Law & Politics* 569–611.